

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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IMPRIMIS INTERNATIONAL, INC.,

Plaintiff,

v.

NO. CIV. S-04-1297 FCD DAD

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

ROBERT B. FRAIDENBURGH,

Defendant.

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On March 16, 2004, plaintiff Imprimis International, Inc. ("Imprimis") filed a Motion for Judgment in the Circuit Court for the City of Alexandria, Virginia, against defendant Robert B. Fraidenburgh ("Fraidenburgh") arising out of on an alleged breach of contract. Subsequently, the case was removed to the Eastern District of Virginia on the basis of diversity jurisdiction and transferred to the Eastern District of California pursuant to 28 U.S.C. § 1404. Plaintiff alleges (1) that it entered into an

1 agreement with defendant Fraidenburgh, doing business as Sunrise
2 Precision; (2) that plaintiff performed all services,
3 stipulations, conditions, and agreements as set forth in the
4 contract; and (3) that defendant failed to pay the money owed
5 plaintiff under the contract. Defendant asserts that the
6 contract was illegal and unenforceable. Alternatively, defendant
7 contends that plaintiff is entitled to receive only partial
8 payment under the contract because the applicability of the
9 doctrine of frustration of purpose and/or because of plaintiff's
10 non-performance of contractual obligations.

11 The court held a bench trial on February 27-28, 2007, at
12 which Ben Hord ("Hord"), the president of plaintiff Imprimis, and
13 defendant Fraidenburgh were the sole witnesses. Considering the
14 evidence presented therein and the parties' written submissions
15 thereafter, the court enters the following findings of fact and
16 conclusions of law pursuant to Federal Rule of Civil Procedure
17 52(a).¹

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22 ¹ The parties originally filed proposed Findings of Fact
23 and Conclusions of Law on March 29, 2007 and April 2, 2007,
24 bereft of any citation to the official trial transcript and any
25 discussion of contract law. After review of these filings, on
26 April 3, 2007, the court directed the parties to file
27 Supplemental proposed Findings of Fact and Conclusions of Law.
28 (Minute Order, Docket # 78, filed April 30, 2007). After the
court granted defendant's request for an extension of time, the
parties' amended briefs were filed on May 11 and May 14, 2007.
Plaintiff's amended filing was not only untimely, but is
substantially unchanged from the original filing. However, for
the purpose of completeness, the court will consider plaintiff's
untimely filing.

FINDINGS OF FACT²

The parties entered into a contract for professional services, (TX 65),³ which provides for a contingency fee arrangement, wherein plaintiff Imprimis would be paid out of funds received by defendant as the result of defendant receiving either a contract or a subcontract for the development and production of a device that would be used in a naval defense system. (Final Pretrial Conference Order, Docket # 69, filed Nov. 15, 2006, Undisputed Fact ¶¶ 1-2).⁴ The contract required

² To the extent that any of the court's findings of fact may be considered conclusions of law or vice versa, they are to be considered as such.

³ All citations to "TX ____" are to the Trial Transcript of the bench trial. All citations *infra* to "TT ____" are to the exhibits admitted into evidence during the trial. At trial, due to the apparent and utter disorganization of both parties' counsel, the exhibits were at times referred to by more than one number. These exhibits were later submitted to the court without any further organization or proper labels. All exhibits submitted to the court are joint exhibits by stipulation of the parties. However, the majority, though not all, of the exhibits are marked with "plaintiffs exhibit" stickers. The court will refer to the numbers on these stickers on the documents submitted to the court, unless otherwise noted.

⁴ Pursuant to Federal Rule of Civil Procedure Rule 16(e) and Local Rule 16-283, the Final Pretrial Order controls the subsequent course of the action. One purpose of the Final Pretrial Conference Order is "to promote efficiency and conserve judicial resources by identifying litigable issues prior to trial." Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985). While both parties proffered evidence at trial that seemingly sought to dispute the previously undisputed facts set forth in the Final Pretrial Conference Order, neither party moved to amend the order or demonstrated good cause for such amendment. See Fed. R. Civ. Proc. 16. As such, the undisputed facts, as set forth by the parties in their joint final pretrial report (Docket # 65) and incorporated in the court's Final Pretrial Conference Order (Docket # 69), are binding and controlling. See United States v. First. Nat'l Bank of Circle, 652 F.2d 882, 886 (9th Cir. 1981) ("[A] party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theorems at the trial which are not included in the order or which

1 plaintiff to perform certain management services on behalf of
2 defendant, as well as assisting defendant to obtain funds already
3 appropriated but not allocated to a Navy contracting office or
4 government contract. (Id., Undisputed Fact ¶ 3). The contract
5 further provided that plaintiff would assist defendant over a
6 period of four separate and distinct phases. (Id., Undisputed
7 Fact ¶ 4). Plaintiff provided services to defendant during the
8 first phase by locating the appropriated funds and by assisting
9 the Navy to transfer those funds. (Id., Undisputed Fact ¶ 5).
10 Plaintiff did not perform on phases 2-4 of the October 3, 2002
11 Agreement for reasons disputed between the parties. (Id.,
12 Undisputed Fact ¶ 6).

13 Plaintiff Imprimis is a management consultation firm,
14 focusing most of its business on issues related to federal
15 appropriations and the Department of Defense. (TT 5:21-25).
16 Principally, plaintiff is in the proposal preparation business,
17 but it also provides general and financial management for its
18 clients. (TT 5:17-20). Hord, the president of Imprimis, has
19 over twenty years of experience in this business. (TT 5:13-14).

20 Defendant Fraidenburgh is a citizen and resident of the
21 State of California, who at one time did business as Sunrise
22 Precision. (Def.'s Am. Answer, Docket # 43, filed Feb. 3, 2006,
23 ¶ 2). Defendant sought to become a second source for the Navy of
24 circuits for traveling wave tubes ("TWTs"), a component necessary
25 for the radar energy surrounding cruisers and warships. (TT
26 208:19-25; 209:11-24; 215:6-11). TWTs were manufactured by
27 _____
28 contradict its terms.").

1 Teledyne, where defendant had previously been employed as a
2 manufacturer of parts for TWTS. (TT 208:13-25). After defendant
3 left Teledyne, he later approached the program manager at
4 Teledyne, who welcomed the idea of having defendant as a second
5 source of TWT parts. (TT 209:20-24). After suffering financial
6 hardship from a failed personally financed first attempt to
7 become a second source,⁵ defendant traveled to Washington, D.C.
8 to speak to a Congressman about the issue in order to obtain
9 government funding. (TT 213:14-16; 214:19-215:2). Subsequently,
10 Congress appropriated one million dollars for this project. (TT
11 8:1-6; 215:15-25). Defendant had never before dealt on his own
12 with the governmental procedures of obtaining government contract
13 funds. (TT 220:13-17). Therefore, he contacted Townsend Van
14 Fleet, a registered lobbyist and a friend of defendant's friend,
15 for help locating the appropriated funds in the budget. (TT
16 10:13-18; 218:2-22). Van Fleet advised defendant that he was
17 going to need a proposal writer and referred defendant to
18 plaintiff Imprimis and Hord. (TT 218:24-219:4).

19 Fraidenburgh first contacted Hord in or about May 2002. (TT
20 11:12-13). Defendant informed Hord about his experience in the
21 field and his first failed attempt at becoming a secondary
22 source. (TT 219:12-13). In or about June 2002, Hord met with
23 defendant and engineers from Teledyne. (TT 11:12-12:12). Hord
24 confirmed with Jim Trudel ("Trudel"), a manager at Teledyne, that
25 Teledyne would support defendant's company as a second source if
26

27 ⁵ Defendant testified that the first attempt to become a
28 secondary source failed as a result of bad raw materials. (TT
212:9-213:13).

1 the appropriated funds could be found and directed toward this
2 project. At that point, plaintiff and defendant entered into a
3 verbal agreement with the understanding that a written agreement
4 would be forthcoming with the effective date of June 5, 2002.
5 (TT 16:19-23).

6 Subsequently, Hord began trying to locate the funds that had
7 been appropriated for defendant's project. (TT 12:24-13:12).
8 Hord was concerned that if the money was not found, it would go
9 into the Navy's general fund at the end of the fiscal year on
10 October 1, 2002. (TT 9:8-14). Hord knew that the money had been
11 appropriated because it had a line and a name in the government
12 appropriations and authorization bill, but he was having
13 difficult actually obtaining the money for the project. (TT
14 13:14-22). In or around August 2002, Hord located the office
15 where the money was. (TT 13:20-25). Subsequently, in or around
16 September 2002, Dick Flaherty ("Flaherty") and Hord from Imprimis
17 had a meeting at the Naval yard in Washington, D.C. with
18 representatives from the Naval base in Crane, Indiana and from
19 the program office in Washington, D.C. (TT 14:2-20). At this
20 five to six hour meeting, it was determined that the one million
21 dollars had mistakenly been put into another program, for which
22 it was not allocated, and that \$80,000 of it had been used. (TT
23 14:21-25). Hord and Flaherty discussed how the money could be
24 appropriately redirected to defendant's second source project.
25 (TT 15:1-10). It was determined that the Navy could get a
26 purchase order for \$100,000 in order for defendant to begin the
27 project and then create a more in-depth engineering and services
28 contract with defendant for the remainder of the appropriated

1 funds. (TT 15:11-21). Thereafter, defendant's proposal to be a
2 second source for TWT materials was put on the agenda of a
3 regularly scheduled meeting between Teledyne and Crane Naval
4 Depot at Teledyne's offices in California in October 2002. (TT
5 224:11-23).

6 Between August and October 2002, plaintiff and defendant
7 worked together to plan how defendant's project would be
8 implemented and what it would cost, in order to justify such
9 expenses to the government. (TT 88:15-20; 89:3). Defendant
10 submitted a list of what he believed was needed for the project
11 and the anticipated costs and Hord gave him notes and proposed
12 modifications. (TT 89:9-14; TX 62-64). Plaintiff and defendant
13 also prepared a document setting forth the proposed timeline for
14 the implementation of the project, from pre-award activities
15 through Phase II Engineering. (TX 7, 69). Hord referred to this
16 as the program object agreement and memorandum ("POA&M")
17 document. (TT 99:6-9).

18 In mid-October 2002, prior to the meeting at Teledyne,
19 plaintiff and defendant executed a formal written contract for
20 plaintiff's services, which had been prepared by plaintiff. (TT
21 158:19-24; 248:14-17). The contract set forth generally that
22 Imprimis would provide services to Sunrise Precision, including
23 (1) locating and identifying "the monies earmarked to 'enable
24 Aegis System (TWT) to be made from competitive US molybdenum
25 suppliers'"; (2) preparing and submitting a proposal "to the
26 Government (through Teledyne Electronic Technologies, Rancho
27 Cordova, California) US Navy" in POA&M format; (3) providing
28 managerial support, financial management, and contractual

1 guidance; (4) assisting Sunrise Precision in obtaining follow-on
2 monies; and (5) supporting Sunrise Precision during the continued
3 multi-year effort. (TX 65). The contract outlined that the term
4 of payments to Imprimis "is based on the concept of performance
5 on the contract," which was divided into four phases with
6 specific duties enumerated under each. (Id.) Phase 1 is
7 described as "Planning and Preparation." (Id.) During this
8 phase, Imprimis was to (1) "assist Sunrise Precision in
9 establishing an entity to perform on the contract"; (2) "provide
10 the guidance and direction to Sunrise Precision"; (3) act as a
11 "management liaison" between the Navy and Sunrise Precision; (4)
12 "monitor the formation of an accounting system"; and (5)
13 "complete the program plan for Sunrise Precision." (Id. at
14 Enclosure 1-1). This phase was expected to be performed within 4
15 months with the rate of compensation for plaintiff set at \$4000
16 per month. (Id.) Phase 2 is described as Engineering Design and
17 Initial Production, during which Imprimis agreed to provide
18 continuous guidance and direction to defendant's management team,
19 monitor financial management and contractual requirements,
20 provide the liaison and interface with the Navy and Teledyne, and
21 assist in obtaining the additional plus-up from Congress to
22 complete the required tasks. (Id.) Phase 3 was described as
23 Certification, and Phase 4 was described as Tungsten
24 Certification. (Id. at Enclosure 1-2). The contract also
25 memorialized that while the Agreement was formally executed by
26 plaintiff on October 13, 2002 and by defendant on October 17,
27 2002, the Agreement actually commenced on or about June 5, 2002,
28 the "Effective Date." (TX 65).

1 At the meeting in late October 2002, defendant and
2 representatives from Crane Naval Depot, Teledyne, and Imprimis
3 discussed defendant's second source proposal. (TT 40:21-41:11;
4 225:7-14). Hord gave a Power Point presentation. (TT 41:17-25;
5 225:17-18). The presentation set forth in narrative form the
6 program background, the program objectives, the proposed timeline
7 for the implementation of the program, and the proposed approach.
8 (TX 20).⁶ The technical information included in the presentation
9 was supplied by defendant, the Navy, and Trudel. (TT 134:8-13;
10 226:12-19). After Hord's Power Point presentation, a
11 representative from Teledyne, Mike Baker, gave a presentation
12 setting forth what Teledyne would require to be the prime
13 contractor on the project. (TT 228:2-10). Thereafter, defendant
14 gave a technical presentation for which he brought in a prototype
15 of a TWT part that he had previously made. (228:13-23). The
16 Navy agreed to the proposal, with Teledyne acting as the prime
17 contractor and defendant acting as the subcontractor. (TT
18 228:9).

19 In January 2003, defendant received a purchase order from
20 Teledyne in the amount of \$100,000 to begin the project. (TX 61;
21 TT 235:15-236:9). This was a result of a Statement of Work
22 executed between defendant and Teledyne. (Id.) There is no
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24 ///

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26 ⁶ At trial, defendant expressed dissatisfaction with the
27 Power Point presentation primarily because of the prevalence of
28 Imprimis' logo throughout the presentation. (TT 227:3-16). Such
belatedly expressed dissatisfaction is irrelevant to the inquiry
before this court. There is no dispute that Hord gave the
presentation at the October meeting.

1 evidence that Hord or plaintiff helped with the preparation of
2 this document.⁷

3 After the October 2002 meeting, the relationship between
4 plaintiff and defendant began to deteriorate. Defendant had
5 difficulty contacting Hord or plaintiff. (TT 249:23-25).
6 Defendant continued to e-mail plaintiff with information and
7 status reports. (TT 249:23-250:9). Plaintiff's responses were
8 sporadic and often unintelligible. (TT 250:3-9; see e.g., TX 68,
9 77). Hord admitted that there was a hiatus in communication
10 between January and March 2003. (TT 119:13-15). In February
11 2003, defendant incorporated the entity that would perform on the
12 subcontract, Optimet Corporation, with the help of his attorney,
13 Frank Radoslovich. (TT 242:18-243:9). In March 2003, Hord told
14 defendant that he was in Florida working for another client. (TT
15 251:21-23). When defendant expressed concern about the project,
16 Hord stated that defendant did not need him to actually write a
17 proposal because defendant's relationship with Teledyne was so
18 good that it would carry the project through. (TT 251:22-252:1).
19 In fact, plaintiff did not write the Statement of Work for the
20 remainder of the funds. (TT 178:14-20; TX 46). Rather, Teledyne
21 drafted the Statement of Work with input from defendant. (TT
22 178:20; 253:1-2). Hord did not see this document, dated March
23 14, 2004, until his deposition was taken in the course of this
24

25 ⁷ Hord testified that the Statement of Work was virtually
26 identical to the POA&M. The court's review of these documents
27 contradicts this testimony. Not only do the "milestones" fail to
28 coincide, but such objectives are phrased in very general terms
on both documents. (Compare TX 7 with TX 61). As such, there is
no evidence that the POA&M drafted by Hord and Imprimis had any
effect on subsequent proposals.

1 litigation. (TT 172:21-24; TX 46). Hord contends that this
2 document was crafted from information that he had previously
3 drafted with defendant. (TT 172:7-20). However, none of the
4 documents drafted by plaintiff, including the Power Point
5 presentation or the POA&M document, nor the conclusory and self-
6 serving testimony of Hord demonstrate that the Statement of Work
7 was merely a rephrasing of plaintiff's information or prior work-
8 product. (Compare TX 46 with TX 20, 7, 69).

9 On April 22, 2003, defendant sent an e-mail to Hord, seeking
10 to modify the terms of the contract because Teledyne had stepped
11 into the role of proposal writer and project manager, which had
12 been plaintiff's role under the contract. (TX 50). In May 2003,
13 Hord and defendant met at defendant's attorney's office to
14 discuss the contract. (TT 258:7-24). There was heated
15 discussion regarding defendant's position that plaintiff had not
16 performed fully under the contract and thus, was not owed the
17 amount it sought. (TT 259:4-12). Finally, on or about August
18 24, 2003, defendant had a conference call at Teledyne with
19 representatives from Teledyne and Crane Naval Depot during which
20 the proposal was reviewed and the representatives from Crane
21 Naval Depot told defendant that Hord should not receive any of
22 the money allocated to the project. (TT 262:11-25).

23 Subsequently, on August 25, 2003, defendant sent an e-mail to
24 Hord, informing him that defendant was instructed by the
25 representatives from Crane that none of the funding could pay for
26 plaintiff's services. (TX 92). The e-mail also gave Hord the
27 name and telephone number of defendant's attorney and stated that
28 ///

1 defendant would be relying on his attorney for advice in the
2 matter. (TX 92).

3 Defendant has not paid plaintiff any fees under the
4 contract. (TT 265:3-266:6). Defendant has not reimbursed
5 plaintiff for any out of pocket expenses advanced or incurred by
6 plaintiff in connection with the contract. (TT 265:3-266:6).
7 Plaintiff seeks damages in the amount of \$117,000, the amount
8 that it believes will compensate it for the services actually
9 performed under the contract. (TT 164:13-165:1). Plaintiff also
10 seeks reimbursement for out of pocket expenses incurred in
11 performance of the contract. (TX 2-4).

12 **CONCLUSIONS OF LAW**

13 Plaintiff Imprimis has filed this action based upon its
14 contention that defendant Fraidenburgh breached their contract by
15 failing to pay for the professional services rendered by
16 plaintiff. This court has jurisdiction based upon the parties'
17 diversity of citizenship. Therefore, state law controls on all
18 substantive issues, including contractual interpretation issues.
19 Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 784 (9th
20 Cir. 1980). A district court sitting in diversity must apply the
21 choice of law rules of the forum state. Ledesma v. Jack Stewart
22 Produce, Inc., 816 F.2d 482, 484 (9th Cir. 1987). Although
23 explicitly directed by the court to do so, (Docket # 78), neither
24 party has set forth what state law they believe should apply to

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1 this case nor have they consistently applied any one state's law
2 in their discussion of contract principles.⁸

3 The contract between the parties provides that the contract
4 "shall be governed by the State of Virginia." (TX 65). Under
5 California law, absent the presence of strong public policy
6 requiring application of California law, the intention of the
7 parties to apply Virginia should govern. Consolidated Data
8 Terminals v. Applied Digital Data, 708 F.2d 385, 391 (9th Cir.
9 1983); see Haisten v. Grass Valley Med. Reimbursement Fund, 784
10 F.2d 1392, 1402 (9th Cir. 1986). Because the court is not aware
11 of any such strong public policy and because the parties have not
12 raised any argument whatsoever relating to choice of law, the
13 court will apply Virginia state contract law to the facts of this
14 case.⁹

15 **1. Illegal and Unenforceable Contract**

16 Defendant contends that the contract is illegal and
17 unenforceable because it required him to pay Hord federal funds
18 for influencing the Navy in connection with the award of a
19 federal contract, in violation of 31 U.S.C. § 1352. "Generally,
20 a contract based on an act forbidden by a statute is void and no
21 action will lie to enforce the contract." Eure v. Jefferson
22 Nat'l Bank, 248 Va. 245, 252 (1994) (quoting Blick v. Marks,
23 Stokes and Harrison, 234 Va. 60, 64 (1987)). However, "the

24 ⁸ Despite the court's explicit instruction to do so,
25 (Docket #78), plaintiff has failed to submit any argument
26 regarding contract law in its supplemental briefing.

27 ⁹ Defendant's prior counsel, who filed the motion to
28 change venue pursuant to 28 U.S.C. § 1404 from the Eastern
District of Virginia to this court, conceded in his moving papers
that Virginia law applies to this action.

1 illegal . . . nature of a contract for professional services will
2 not be presumed; the burden of proving the illegality of the
3 contract is clearly upon the party asserting it." Troutman v. S.
4 Ry. Co., 441 F.2d 586, 589 (5th Cir. 1971) (holding that the
5 defendant failed to demonstrate that the employment contract at
6 issue was illegal as a contract to improperly influence a public
7 official in the exercise of his duties where the plaintiff's
8 influence was used merely to obtain an audience with the
9 President to present the merits of the defendant's position)
10 (citations omitted)¹⁰; see Steele v. Drummond, 275 U.S. 199, 205
11 (1927) ("Detriment to the public interest will not be presumed,
12 where nothing sinister or improper is done or contemplated.").
13 Section 1352 provides, in relevant part:

14 None of the funds appropriated by any Act may be
15 expended by the recipient of a Federal contract . . .
16 to pay any person for influencing or attempting to
17 influence an officer or employee of any agency

17 31 U.S.C. § 1352 (West 2007). The provisions of § 1352 also
18 apply to any person who receives a subcontract under a Federal
19 contract. 31 U.S.C. § 1352(b)(5). However, this limitation on
20 use of federal funds does not apply "if the payment is for
21 professional or technical services rendered directly in the
22 preparation, submission, or negotiation of any bid, proposal, or
23 application for that Federal contract" 31 U.S.C. §
24 1352(d)(1)(B).

25
26 ¹⁰ Because the case law interpreting § 1352 is sparse and
27 inapplicable to the facts of this case, the court finds
28 persuasive decisions relating to the enforceability of contracts
for personal services that have been challenged as illegal or
against public policy because they contemplate the use of
personal or political influence upon the government.

1 By its terms, the contract does not implicate the provisions
2 of § 1352. (TX 65). The contract contains no terms which call
3 for plaintiff to influence Congress or agency officials in
4 obtaining a federal contract. However, defendant argues that in
5 executing the contract, particularly in "locating and identifying
6 the monies," Hord, on behalf of plaintiff Imprimis, influenced
7 "Navy brass" into diverting the already appropriated funds into
8 defendant's project. In support of this contention, defendant
9 relies on admissions to him by Hord that he was going to contact
10 his "buddies" in Washington to make sure the money didn't go
11 away. (TT 238:13-17). Defendant also contends that Hord stated
12 to him on several occasions that "[he] made the money come, [he]
13 could make it go away." (TT 253:23-25).

14 The court finds credible defendant's testimony that Hord
15 made statements alluding to some inordinate amount of influence
16 he had over the allocation of federal funds. While such
17 statements are admissible, substantive evidence as admissions by
18 a party opponent, the court, as the trier of fact, must determine
19 the weight to give to such statements, considering the
20 circumstances under which they were made. The testimony of both
21 defendant and Hord reveal that defendant had no experience with
22 the governmental procedures of obtaining government contract
23 funds and that Hord had over twenty years of experience in this
24 area. (TT 5:13-14; 220:13-17). The evidence also demonstrated
25 that throughout the performance of the contract, Hord sought to
26 impress the weight of such expertise on defendant and make his
27 services appear both essential and invaluable to defendant's
28 success in executing the project. This remained true even after

1 it became clear that Teledyne had stepped into the role of
2 project manager and proposal writer. (See TX 49). Defendant
3 testified that Hord's admissions regarding making contact with
4 his "buddies" about the funding was made after the October 2002
5 meeting at Teledyne, when it was apparent that Teledyne would be
6 the prime contractor for the second source project. (TX 238:1-
7 24).¹¹ Defendant further testified that Hord made statements
8 regarding making the money go away at several points after the
9 October 2002 meetings, including in May 2003 when defendant
10 expressed that he did not want to pay the money plaintiff
11 believed was due under the contract. (254:3-5; 259:13-15). The
12 court finds that these circumstances indicate that plaintiff's
13 statements were made in an attempt to bolster his position in
14 defendant's eyes and maintain the contractual relationship, which
15 was on tenuous ground. As such, Hord's statements alluding to
16 his conduct and ability to influence Naval officials are
17 insufficient to demonstrate that plaintiff's conduct in
18 performing under the contract violated § 1352 and rendered the
19 contract unenforceable.

20 Further, the court also finds credible Hord's testimony that
21 he arranged a meeting with Naval officials in September 2002
22

23 ¹¹ Moreover, Hord's statement that he would talk to his
24 "buddies" or "friends" regarding the funding does not necessarily
25 implicate "influence" within the meaning of § 1352. Any
26 influence based upon Hord's personal relationship with Naval
27 officials may have been employed solely to gain access to the
28 appropriate individuals in order to present the merits of his
client's case. See Troutman, 441 F.2d at 589 (citing Hall v.
Anderson, 18 Wash. 2d 625 (1943); Old Dominion Transp. Co. v.
Hamilton, 146 Va. 594 (1926)); see also Coyne, 80 F.2d at 847
("There must be proof that something contrary to good morals was
contemplated or done.").

1 during which he confirmed and informed the officials that the
2 appropriated funds had been misdirected to a project that could
3 not use the funds and that defendant's project could properly
4 utilize the appropriated funds. Hord's conduct in locating the
5 appropriated funds and informing the Navy that they were
6 currently allocated to an improper project is properly
7 interpreted as a professional service rendered in preparation and
8 negotiation of defendant's application for the federal
9 subcontract. See Trist v. Child, 88 U.S. 441 (1874) (drawing the
10 distinction between the use of personal influence to secure
11 legislation and legitimate professional services in making the
12 legislature acquainted with the merits of the measures desired).
13 Such testimony also demonstrates that Hord presented the merits
14 of defendant's proposal to the Naval officials. See Puma Indus.
15 Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982, 984-85 (2d
16 Cir. 1985) (holding that contingent fee arrangement between the
17 defendant and the plaintiff, who assisted small businesses in
18 procuring contracts with the government, did not violate 41
19 U.S.C. § 254(a) or public policy because there was no hint that
20 the plaintiff was selling government interest, the harm that is
21 to be protected against); Coyne v. Superior Incinerator Co. of
22 Texas, 80 F.2d 844, 846-47 (2d Cir. 1936) (holding that the
23 contingent agreement with the plaintiff, who had a friendship
24 with a government official, was not illegal or unenforceable
25 where there was no evidence that the plaintiff did anything more
26 than use his connection to obtain and a hearing and then try to
27 sell the product on the merits); cf. Ewing v. Nat'l Airport
28 Corp., 115 F.2d 859, 860-61 (4th Cir. 1940) (declaring the

1 contingency fee contract for professional services unenforceable
2 where the evidence of improper influence including letters in
3 which the plaintiff admitted that he promised senators to exert
4 political influence in their home states in return for their help
5 in passage of the legislation). As such, plaintiff's conduct is
6 explicitly addressed by the exception for professional and
7 technical services set forth in § 1352. Therefore, the contract,
8 as performed by plaintiff, is not illegal or unenforceable.

9 **2. Frustration of Purpose**

10 Defendant also contends that the court should not enforce
11 the contract based upon the defense of frustration of purpose.¹²
12 The doctrine of frustration of purpose discharges a party from
13 its contractual obligations due to some supervening occurrence
14 which frustrates the party's purpose in entering into the
15 contract. Coker Int'l, Inc. v. Burlington Indus., Inc., 935 F.2d
16 267 (4th Cir. 1991).

17 Where, after a contract is made, a party's principal
18 purpose is substantially frustrated without his fault
19 by the occurrence of an event the non-occurrence of
20 which was a basic assumption on which the contract was
made, his remaining duties to render performance are
discharged, unless the language or circumstances
indicate the contrary.

21 Restatement (Second) of Contracts § 265 (1979). Defendant
22 asserts that when Teledyne became the prime contractor for the
23 second source project and defendant became the subcontractor,
24 Phases 2-4 of the contract were commercially frustrated because
25 Teledyne was in charge of all dealings with the Navy.

26 ¹² While this affirmative defense was not pled in
27 defendant's answer, for the sake of completeness, the court will
28 consider the applicability of this theory to the facts presented
at trial.

1 Specifically, defendant asserts that plaintiff did not assist in
2 drafting the proposal submitted to the Navy because Teledyne
3 drafted the proposal.

4 Determination of the purpose of the contract is a matter of
5 contract interpretation. Virginia law respecting contract
6 interpretation is well settled. Bridgeston/Firestone, Inc. v.
7 Prince William Square Assocs., 250 Va. 402, 407 (1995). "When
8 contract terms are clear and unambiguous, a court must construe
9 them according to their plain meaning. Id. (citing Food First,
10 Inc. v. Gables Assocs., 244 Va. 180, 182 (1992); Winn v. Aleda
11 Const. Co., 227 Va. 304, 307 (1984)). "[A] court must construe
12 the words as written and not make a new contract for the
13 parties." Id. (citing Berry v. Klinger, 225 Va. 201, 208
14 (1983)). Parol evidence may only be admitted to establish the
15 intention of the parties, and thus, the real contract between the
16 parties when the language of a contract is ambiguous. Tuomala v.
17 Regent Univ., 252 Va. 368, 374 (1996).

18 The contract between plaintiff and defendant provides that
19 plaintiff "Imprimis will provide Business Development and
20 Corporate Support to Sunrise Precision." (TX 65). In addressing
21 plaintiff's duties in drafting proposals for the Navy, the
22 contract explicitly provides that plaintiff will "[p]repare and
23 submit a proposal to the Government (*through Teledyne Electronic*
24 *Technologies*, Rancho Cordova, California) . . . containing the
25 appropriate plan in POA&M format." (TX 65) (emphasis added).
26 The contract also provided that plaintiff will provide support
27 and guidance "in support of the performance on the ensuing
28 contract/task orders/purchase orders from the Navy *through*

1 *Teledyne Electronic Technologies*. (TX 65) (emphasis added).
2 Moreover, under the "Terms and Conditions" of the contract, which
3 breakdown plaintiff's explicit duties into the four phases, the
4 contract language consistently refers to Teledyne's role in the
5 project and explicitly sets forth that the "Navy has agreed to
6 provide the remaining monies of the \$1M plus up to Sunrise
7 Precision through *Teledyne Electronics Technologies*." (TX 65 at
8 Enclosure 1-1). The court finds that it is clear from the
9 unambiguous terms of the contract that the parties contemplated
10 that Teledyne would be the prime contractor and that defendant
11 would be the subcontractor on the second source contract.
12 Because defendant's asserted "supervening occurrence" was
13 contemplated in the contract, the purpose of the contract was not
14 frustrated by an event, "the non-occurrence of which was a basic
15 assumption on which the contract was made." See Restatement
16 (Second) of Contracts § 265. Therefore, the defense of
17 frustration of purpose does not apply to this case.

18 **3. Failure of Consideration/Performance**

19 Defendant also asserts that the contract should not be
20 enforced because of failure of consideration. (See Def.'s Am.
21 Answer, Docket # 43, filed Feb. 3, 2006, at 2; Final Pretrial
22 Conference Order, Docket # 69, Disputed Facts ¶ 8).
23 Specifically, defendant contends that any failure by defendant to
24 pay plaintiff's fees under the contract described resulted from
25 plaintiff's failure to perform the services required under the
26 contract.

27 What is sometimes referred to as a "failure of
28 consideration" by courts and statutes, is referred to by the

1 Restatement (Second) of Contracts as "failure of performance.
2 Restatement (Second) of Contracts § 237 comment a (2007); see
3 Citland, Ltd. v. Com. ex re. Kilgore, 45 Va. App. 268, 277 n.5
4 (2005) (citing § 237 of the Restatement (Second) of Contracts);
5 see also R.G. Pope Const. Co., Inc. v. Guard Rail of Roanoke,
6 Inc., 219 Va. 111, 119 (1978) (finding that in a contract for
7 reciprocal promises, the performance of the defendant's duty did
8 not become due until the plaintiff's performance occurred or was
9 excused). "A material failure of performance, including
10 defective performance as well as an absence of performance,
11 operates as the non-occurrence of a condition." Id. Such non-
12 occurrence of a condition prevents the performance of the duty
13 subject to that condition from becoming due or, if performance is
14 no longer possible, discharges the duty. Id.; Horton v. Horton,
15 254 Va. 111, 116 (1997) ("If the initial breach is material, the
16 other party to the contract is excused from performing his
17 contractual obligations."). The failure to perform is deemed
18 "material" where the "breach was so central to the parties'
19 agreement that it defeated an essential purpose of the contract."
20 Horton, 254 Va. at 116 (citations omitted); see RW Power
21 Partners, L.P. v. Virginia Elec. and Power Co., 899 F. Supp. 1490
22 (E.D. Va. 1995) (stating that "a material breach is one that goes
23 to the root of the contract").

24 The evidence at trial demonstrated that plaintiff performed
25 services for defendant beginning in June 2002, the effective date
26 of the contract. Between June 2002 and October 2002, plaintiff
27 met with defendant in California, attended meetings in
28 Washington, D.C., to ensure that the appropriated funds were

1 available for defendant's project, discussed with defendant the
2 anticipated costs of implementing the project, drafted the POA&M
3 document, and gave a Power Point presentation at the Teledyne
4 facility in October 2002. As such, the court finds that
5 plaintiff performed the services required under the contract up
6 until November 2002.

7 However, the evidence also demonstrated that subsequent to
8 the meeting at Teledyne in late October 2002, plaintiff's
9 relationship with defendant quickly deteriorated. The parties
10 had little communication with each other. The sparse
11 communication that did take place consisted primarily of
12 defendant's attempts to contact Hord and keep him apprised of the
13 status of the project. Defendant incorporated the corporation
14 that was to perform under the project, Optimet, with the help of
15 his attorney, not Hord. Hord did not contribute to the drafting
16 of the proposal that was submitted to the Navy in March 2003, and
17 in fact, had never seen the document until the commencement of
18 this litigation. Nor is there any evidence that plaintiff took
19 an active role in helping defendant set up or manage his
20 corporation in 2003. Such failure of communication and lack of
21 active participation in defendant's business and the negotiations
22 between defendant, Teledyne, and the Navy go to the root of
23 plaintiff's contract "to provide Business Development and
24 Corporate Support to Sunrise Precision." As such, plaintiff
25 failed to perform a material condition of the contract. Further,
26 such performance could no longer occur because the professional
27 services contracted for, at least under Phase 1, were plaintiff's
28 assistance and support in obtaining the government contract.

1 Therefore, defendant was relieved of his subsequent duty to pay
2 plaintiff or further perform under the contract.¹³ See Horton,
3 254 Va. at 116-17.

4 **D. Damages**

5 Under Virginia law, a party who commits the first material
6 breach of a contract is not entitled to enforce the contract.
7 Federal Ins. Co. v. Starr Elec. Co., 242 Va. 459, 468 (1991); see
8 Horton, 254 Va. at 117 ("[A] party who has materially breached a
9 contract is not entitled to recover damages for the other party's
10 subsequent nonperformance of the contract."). Further, if the
11 contract is entire, a party's material breach will preclude
12 recovery, even for partial performance prior to the breach. Am.
13 Chlorophyll v. Schertz, 176 Va. 362, 371 (1940). If the contract
14 is divisible, a party may recover for part performance and such
15 recovery is not barred by a subsequent breach by the party who
16 seeks recovery. Id. The entirety or divisibility of a contract
17 is dependant on the intention of the contracting parties. Id.
18 (citing Eschner v. Eschner, 146 Va. 417 (1926)).

19 The terms of the contract demonstrate the parties' intent
20 that the contract be divisible. The contract was set up to be
21 performed in four separate phases, generally coinciding with the
22 anticipated implementation of defendant's project. Within each
23 phase, the payment for plaintiff's services was set out in

24
25 ¹³ Both parties stated in the Final Pretrial Conference
26 Order that plaintiff did not perform under Phases 2-4 of the
27 contract. Further, based upon the evidence presented at trial,
28 the court finds that plaintiff did not perform any services under
Phase 2 of the contract, which was directed at Engineering Design
and Initial Production Stage of the project. (TX 65). As such,
plaintiff's contention that it performed under Phase 2 of the
contract is both contradictory and utterly without merit.

1 monthly intervals. The payment structure was not based upon
2 benchmarks achieved by plaintiff or defendant, but rather by
3 supporting services provided during the month. Therefore, the
4 court finds that the contract is divisible, and thus, plaintiff
5 may recover for partial performance despite its subsequent
6 failure to perform. See id. at 372 (finding that the contract
7 was divisible where the defendants promised to pay the plaintiff
8 in regular intervals and where the contract was to be performed
9 in separate stages).

10 In a divisible contract, "the party in breach is entitled to
11 restitution for any benefit that he has conferred by way of part
12 performance." Restatement (Second) of Contracts § 374 (2007);
13 see Am. Chlorophyll, 176 Va. at 373.¹⁴ The sum of money to be
14 awarded to protect a party's restitution interest is the
15 reasonable value to the other party of the services he received.
16 Restatement (Second) of Contracts § 371 (2007).

17 Defendant does not dispute that the reasonable value of
18 plaintiff's services for planning and preparation under Phase 1
19 of the contract is \$4000 per month. (See Def.'s Am. Proposed
20 Findings of Fact and Conclusions of Law, Docket # 82, filed May
21 11, 2007, at 43 ¶ 5). The evidence at trial demonstrated that
22 plaintiff performed under Phase 1 of the contract from June 2002
23


24 ¹⁴ Defendant notes that plaintiff did not plead damages
25 under a theory of restitution or quantum meruit. However,
26 defendant is mistaken. Plaintiff sought damages for \$117,000,
27 the asserted value of the services that it believed it performed
28 under the contract. Plaintiff did not seek damages under the
penalty clause of the contract or for the full value of the
contract. Therefore, implicitly plaintiff seeks an award of
damages measured by the reasonable value of the services
rendered, i.e. restitution.

1 through October 2002, a period of five months.¹⁵ Therefore, the
2 value of plaintiff's services prior to its failure of performance
3 is \$20,000.¹⁶ Plaintiff also demonstrated at trial that prior to
4 its failure of performance, it incurred \$604 in travel and
5 expenses in June 2002. (TX 2). The remaining expenses presented
6 at trial were incurred after October 2002, and thus, are not
7 recoverable.¹⁷ As such, plaintiff is entitled to restitution
8 damages in the amount of \$20,604.00.

9 The Clerk of the Court is directed to close this file.

10 IT IS SO ORDERED.

11 DATED: May 31, 2007.

12
13
14 
15 FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE
16
17
18

19 ¹⁵ The contract anticipated that Phase 1 would take
20 approximately four months to complete. The evidence at trial
demonstrated that Phase 1, as contemplated under the contract,
took over a year to complete.

21 ¹⁶ In its calculation of damages, plaintiff implicitly
22 argues that after providing four months of services at \$4000, the
cost of its services rose to \$9000 per month. However, under the
23 contract, plaintiff was to be paid \$9000 per month for services
provided during the engineering design and initial production
24 stage of the project, Phase 2. These services were never
provided because the project never reached this stage before
25 plaintiff's failure of performance. Therefore, the court does
not find that any of plaintiff's performed services can be valued
26 at \$9000 per month.

27 ¹⁷ Plaintiff also incurred travel expenses in February and
28 May 2003. However, plaintiff cannot be compensated for these
costs because they were incurred after plaintiff's material
failure of performance.